

**Before the  
Federal Communications Commission  
Washington, D.C. 20554**

In the Matter of	)	
	)	
Time Warner Entertainment-Advance/Newhouse	)	
Partnership	)	
	)	CSR 7490-E
Petition for Determination of Effective	)	
Competition in 24 Communities in the State of	)	
New York and the Commonwealth of	)	
Pennsylvania	)	

**MEMORANDUM OPINION AND ORDER**

**Adopted: December 29, 2008**

**Released: December 29, 2008**

By the Senior Deputy Chief, Policy Division, Media Bureau:

**I. INTRODUCTION AND BACKGROUND**

1. Time Warner Entertainment-Advance/Newhouse Partnership, hereinafter referred to as “Petitioner,” has filed with the Commission a petition pursuant to Sections 76.7, 76.905(b)(2), 76.905(b)(1) and 76.907 of the Commission’s rules for a determination that Petitioner is subject to effective competition in the 24 communities listed on Attachment A and hereinafter referred to as the “Communities.” Petitioner alleges that its cable systems serving the communities listed on Attachment B and hereinafter referred to as the Attachment B Communities, as well as the communities listed on Attachment C and hereinafter referred to as the Attachment C Communities, are subject to effective competition pursuant to Section 623(l)(1)(B) of the Communications Act of 1934, as amended (“Communications Act”)<sup>1</sup> and the Commission’s implementing rules,<sup>2</sup> and are therefore exempt from cable rate regulation because of the competing service provided there by two direct broadcast satellite (“DBS”) providers, DirecTV, Inc. (“DirecTV”) and Dish Network (“Dish”).

2. Petitioner also claims to be subject to effective competition because of the DBS providers in the Communities listed on Attachment D and hereinafter referred to as the Attachment D Communities, but has not furnished the data with which we can adjudicate those claims. Petitioner has, however, furnished data with which we can determine whether Petitioner is exempt from cable rate regulation in the Attachment D Communities because it serves fewer than 30 percent of the households there. The petition is unopposed.

3. In the absence of a demonstration to the contrary, cable systems are presumed not to be subject to effective competition,<sup>3</sup> as that term is defined by Section 623(l)(1) of the Communications Act and Section 76.905(b) of the Commission’s rules.<sup>4</sup> The cable operator bears the burden of rebutting the presumption that effective competition does not exist with evidence that effective competition is present within the relevant franchise area.<sup>5</sup> For the reasons set forth below, we grant the petition as to all of the

<sup>1</sup> See 47 U.S.C. § 543(l)(1)(B).

<sup>2</sup> 47 C.F.R. § 76.905(b)(2).

<sup>3</sup> 47 C.F.R. § 76.906.

<sup>4</sup> See 47 U.S.C. § 543(l)(1) and 47 C.F.R. § 76.905(b).

<sup>5</sup> See 47 C.F.R. §§ 76.906 & 907.

Attachment B Communities and the Attachment D Communities, based on our finding that Petitioner is subject to effective competition in them; and we deny the petition as to the Attachment C Communities.

## II. DISCUSSION

### A. The Competing Provider Test

4. Section 623(l)(1)(B) of the Communications Act provides that a cable operator is subject to effective competition if the franchise area is (a) served by at least two unaffiliated multi-channel video programming distributors (“MVPD”) each of which offers comparable video programming to at least 50 percent of the households in the franchise area; and (b) the number of households subscribing to programming services offered by MVPDs other than the largest MVPD exceeds 15 percent of the households in the franchise area;<sup>6</sup> this test is otherwise referred to as the “competing provider” test.

5. The first prong of this test has three elements: the franchise area must be “served by” at least two unaffiliated MVPDs who offer “comparable programming” to at least “50 percent” of the households in the franchise area.<sup>7</sup>

6. Turning to the first prong of this test, it is undisputed that the Attachment B Communities and the Attachment C Communities are “served by” both DBS providers, DIRECTV and Dish, and that these two MVPD providers are unaffiliated with Petitioner or with each other. A franchise area is considered “served by” an MVPD if that MVPD’s service is both technically and actually available in the franchise area. DBS service is presumed to be technically available due to its nationwide satellite footprint, and presumed to be actually available if households in the franchise area are made reasonably aware of the service’s availability.<sup>8</sup> The Commission has held that a party may use evidence of penetration rates in the franchise area (the second prong of the competing provider test discussed below) coupled with the ubiquity of DBS services to show that consumers are reasonably aware of the availability of DBS service.<sup>9</sup> We further find that Petitioner has provided sufficient references to DBS promotions in media that serve the Attachment B Communities and the Attachment C Communities to support its assertion that potential customers in the Attachment B Communities and the Attachment C Communities are reasonably aware that they may purchase the service of these MVPD providers.<sup>10</sup> The “comparable programming” element is met if a competing MVPD provider offers at least 12 channels of video programming, including at least one channel of nonbroadcast service programming<sup>11</sup> and is supported in this petition with citations to the channel lineups for both DIRECTV and Dish.<sup>12</sup> Also undisputed is Petitioner’s assertion that both DIRECTV and Dish offer service to at least “50 percent” of the households in the Attachment B Communities and the Attachment C Communities because of their national satellite footprint.<sup>13</sup> Accordingly, we find that the first prong of the competing provider test is satisfied as to both the Attachment B Communities and the Attachment C Communities.

7. The second prong of the competing provider test requires that the number of households

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<sup>6</sup> 47 U.S.C. § 543(l)(1)(B); *see also* 47 C.F.R. § 76.905(b)(2).

<sup>7</sup> 47 C.F.R. § 76.905(b)(2)(i).

<sup>8</sup> *See* Petition at 3-5.

<sup>9</sup> *Mediacom Illinois LLC et al., Eleven Petitions for Determination of Effective Competition in Twenty-Two Local Franchise Areas in Illinois and Michigan*, 21 FCC Rcd 1175 (2006).

<sup>10</sup> 47 C.F.R. § 76.905(e)(2); *see also* Petition at 4 n.12; *id.* at 6.

<sup>11</sup> *See* 47 C.F.R. § 76.905(g); *see also* Petition at 6.

<sup>12</sup> *See* Petition at 6.

<sup>13</sup> *See id.* at 7.

subscribing to MVPDs, other than the largest MVPD, exceed 15 percent of the households in a franchise area. Petitioner asserts that it is the largest MVPD in ten of the Attachment B Communities and the Attachment C Communities.<sup>14</sup> Petitioner sought to determine the competing provider penetration in these Communities by purchasing a subscriber tracking report from the Satellite Broadcasting and Communications Association that identified the number of subscribers attributable to the DBS providers within these Communities on a five-digit zip code basis.<sup>15</sup>

8. In the remainder of the Attachment B Communities and the Attachment C Communities, the largest MVPD is unable to be identified because Petitioner's subscribership is over 15 percent and so is the DBS providers', but Petitioner's is less than the DBS providers'.<sup>16</sup> It is possible that the largest MVPD there is Petitioner or either of the two DBS providers. In such circumstances, nevertheless, it is clear that the second prong of the competing provider test is satisfied. If Petitioner is the largest MVPD in a Community, then the combined subscribership of the other MVPDs (the DBS providers) is greater than 15 percent. Or, if one of the DBS providers is the largest MVPD in the Community, then the combined subscribership of the other MVPDs (Petitioner and the other DBS provider) is greater than 15 percent. Petitioner's data shows that both these determinations can be made for all the Attachment B Communities and the Attachment C Communities in which the largest MVPD cannot be identified.<sup>17</sup>

9. Based upon the aggregate DBS subscriber penetration levels that were calculated using Census 2000 household data,<sup>18</sup> as reflected in Attachment B and Attachment C, we find that Petitioner has demonstrated that the number of households subscribing to programming services offered by MVPDs, other than the largest MVPD, exceeds 15 percent of the households in both the Attachment B and Attachment C Communities. Therefore, the data in the Petition indicate that the second prong of the competing provider test is satisfied for each of the Attachment B and Attachment C Communities.

10. Attachment C, however, lists five Communities in which Petitioner's data show that the combined subscriberships of Petitioner and the DBS Providers exceed 100 percent of the households there. This data is obviously inaccurate and unreliable. It may be that the excessive subscribership totals result from the combined application of very small populations (in each of the Attachment C Communities, there are less than a thousand households) and five-digit zip codes that cover large areas and many households outside the franchise areas. Whatever the reason, we cannot disregard these inaccuracies, which Petitioner should have corrected before filing or noticed and brought to our attention, because they undermine the reliability of the five-digit zip code data in these instances. We deny the petition as to the Attachment C Communities.

11. Based on the foregoing, we conclude that Petitioner has submitted evidence about the Attachment B Communities that is reliable and that demonstrates that both prongs of the competing provider test are satisfied there, allowing us to conclude that Petitioner is subject to effective competition there. Accordingly, we grant the petition as to the Attachment B Communities.

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<sup>14</sup> See Petition at 7. These Communities are Addison (Town), Dundee (Village), Montour Falls (Village), Odessa (Village), Watkins Glen (Village), Lawrence (Township), Lawrenceville (Borough), Osceola (Township), Tioga (Borough), and Tioga (Township).

<sup>15</sup> See Petition at 9 n.26.

<sup>16</sup> See Petition at 7. These Communities are Clarksville (Town), Dix (Town), Starkey (Town), Tuscarora (Town), Woodhull (Town), Deerfield (Township), and Ulysses (Borough).

<sup>17</sup> See Petition at Exhs. A & E.

<sup>18</sup> See *id.* at 9 n.26.

## B. The Low Penetration Test

12. Section 623(l)(1)(A) of the Communications Act provides that a cable operator is subject to effective competition if the Petitioner serves fewer than 30 percent of the households in the franchise area; this test is otherwise referred to as the “low penetration” test.<sup>19</sup>

13. Petitioner alleges that it is subject to competing provider effective competition in the Attachment D Communities, and the first prong of that kind of effective competition is satisfied in them. Petitioner, however, has submitted incomplete or flawed evidence about the second prong. In two Attachment D Communities, the Towns of Catlin and Hornby in New York, Petitioner supplied no data about DBS subscribership. In the other Attachment D Communities, Petitioner’s subscribership is very small and, if the subscribership of one of the DBS providers is also very small, then the subscribership of the MVPDs other than the largest MVPD would not exceed 15 percent of the households in the franchise area.<sup>20</sup> Thus, Petitioner cannot satisfy the second prong of the competing provider effective competition test in the Attachment D Communities.

14. In all the Attachment D Communities, however, Petitioner’s subscribership is under 30 percent.<sup>21</sup> Based upon the subscriber penetration level calculated by Petitioner, as reflected in Attachment D, we find that Petitioner has demonstrated the percentage of households subscribing to its cable service is less than 30 percent of the households in the Communities listed on Attachment D. Therefore, the low penetration test is satisfied in those Communities.

## III. ORDERING CLAUSES

15. Accordingly, **IT IS ORDERED** that the petition for a determination of effective competition filed in the captioned proceeding by Time Warner Entertainment-Advance/Newhouse Partnership **IS GRANTED** as to the Communities listed in Attachment B and Attachment D and **IS DENIED** as to the Communities listed in Attachment C.

16. **IT IS FURTHER ORDERED** that the certification to regulate basic cable service rates granted to any of the Communities set forth on Attachment B and Attachment D **IS REVOKED**.

17. This action is taken pursuant to delegated authority pursuant to Section 0.283 of the Commission’s rules.<sup>22</sup>

FEDERAL COMMUNICATIONS COMMISSION

Steven A. Broecker  
Senior Deputy Chief, Policy Division, Media Bureau

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<sup>19</sup> 47 U.S.C. § 543(l)(1)(A).

<sup>20</sup> See Petition at 8-9.

<sup>21</sup> See *id.* at 9.

<sup>22</sup> 47 C.F.R. § 0.283.

## ATTACHMENT A

ALL COMMUNITIES

## CSR 7490-E

COMMUNITIES SERVED BY TIME WARNER ENTERTAINMENT-ADVANCE/NEWHOUSE  
PARTNERSHIP

Communities	CUID(S)
<b>CSR 7490-E</b>	
Addison (Town)	NY0105
Addison (Village)	NY0446
Catlin (Town)	NY0927
Clarksville (Town)	NY1707
Dix (Town)	NY0909, NY1356
Dundee (Village)	NY1332
Hornby (Town)	NY0916
Montour Falls (Village)	NY0584
Montour (Town)	NY0758
Odessa (Village)	NY0585
Reading (Town)	NY0757
Starkey (Town)	NY1589
Thurston (Town)	NY1531
Tuscarora (Town)	NY1608
Watkins Glen (Village)	NY0518
Wheeler (Town)	NY1610
Woodhull (Town)	NY1447
Deerfield (Township)	PA2458
Lawrence (Township)	PA2717
Lawrenceville (Borough)	PA2719
Osceola (Township)	PA2722
Tioga (Borough)	PA1672
Tioga (Township)	PA1673
Ulysses (Borough)	PA2145

## ATTACHMENT B

**“COMPETING PROVIDER” COMMUNITIES – GRANTED****CSR 7490-E****COMMUNITIES SERVED BY TIME WARNER ENTERTAINMENT-ADVANCE/NEWHOUSE  
PARTNERSHIP**

<b>Communities</b>	<b>CUID(S)</b>	<b>CPR*</b>	<b>2000 Census Households</b>	<b>Estimated DBS Subscribers+</b>
<b>CSR 7490-E</b>				
Addison (Town)	NY0105	36.52%	1026	375
Clarksville (Town)	NY1707	43.35%	447	194
Dix (Town)	NY0909	29.72%	1643	488
	NY1356			
Starkey (Town)	NY1589	30.88%	1243	384
Tuscarora (Town)	NY1608	44.81%	500	224
Woodhull (Town)	NY1447	47.53%	550	261
Deerfield (Township)	PA2458	38.07%	242	92
Lawrence (Township)	PA2717	24.52%	659	162
Osceola (Township)	PA2722	21.55%	268	58
Tioga (Township)	PA1673	29.89%	385	115
Tioga (Borough)	PA1672	29.89%	239	71
Ulysses (Borough)	PA2145	70.90%	268	190

\* CPR = DBS penetration or subscribership

+ See Petition (numbers of DBS subscribers are rounded off)

## ATTACHMENT C

**“COMPETING PROVIDER” COMMUNITIES – DENIED****CSR 7490-E****COMMUNITIES SERVED BY TIME WARNER ENTERTAINMENT-ADVANCE/NEWHOUSE  
PARTNERSHIP**

<b>Communities</b>	<b>CUID(S)</b>	<b>Time-Warner Subscribership*</b>	<b>DBS Subscribership*</b>	<b>2000 Census Households</b>	<b>Estimated DBS Subscribers*</b>
<b>CSR 7490-E</b>					
Dundee (Village)	NY1332	74.28%	29.49%	661	195
Montour Falls (Village)	NY0584	78.03%	25.45%	701	178
Odessa (Village)	NY0585	90.65%	27.27%	246	67
Watkins Glen (Village)	NY0518	82.25%	29.73%	941	280
Lawrenceville (Borough)	PA2719	78.24%	24.52%	262	64

\* See Petition (numbers of DBS subscribers are rounded off)

## ATTACHMENT D

**“LOW PENETRATION” COMMUNITIES – GRANTED**

## CSR 7490-E

**COMMUNITIES SERVED BY TIME WARNER ENTERTAINMENT-ADVANCE/NEWHOUSE  
PARTNERSHIP**

<b>Community</b>	<b>CUIDs</b>	<b>Franchise Area Households</b>	<b>Cable Subscribers</b>	<b>Penetration Percentage</b>
<b>CSR 7490-E</b>				
Addison (Village)	NY0446	724	56	7.73%
Catlin (Town)	NY0927	985	234	23.76%
Hornby (Town)	NY0916	613	178	29.04%
Montour (Town)	NY0758	1005	49	4.88%
Reading (Town)	NY0757	700	29	4.14%
Thurston (Town)	NY1531	462	55	11.90%
Wheeler (Town)	NY1610	437	11	2.52%